

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

PERRY AND SANDRA LACELLE,
husband and wife,

Plaintiffs,

v.

2010-2 SFR VENTURE, LLC, and
MICHELLE GHIDOTTI, Trustee,

Defendants.

NO. CV-12-3007-JPH

ORDER ON DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

I. INTRODUCTION

BEFORE THE COURT is defendants' motion pursuant to Federal Rule of Civil Procedure 56 for summary judgment, ECF No. 20, noted for oral argument on November 9, 2012. ECF No. 21. Defendants moved for summary judgment as to all of plaintiffs' claims and as to defendants' counterclaim. ECF No. 20. On September 20, 2012, plaintiffs responded and cross-moved for partial summary judgment. ECF No. 26, 32. Defendants responded to the cross-motion on October 11, 2012, ECF No. 33, and plaintiffs replied. ECF No. 37. The court heard argument on plaintiffs' cross-motion for partial summary judgment at the same time as defendants' motion. ECF No. 29.

Plaintiffs are represented by Bruce O. Danielson. Defendants are represented by Brian M. Born. The parties have consented to proceed

ORDER ON SUMMARY JUDGMENT

1 before a magistrate judge. ECF No. 14.

2 Plaintiffs' complaint was removed to federal court pursuant to 28
3 U.S.C. § 1331 on January 20, 2012, because it is a civil action
4 presenting a federal question, specifically, the Fair Debt Collection
5 Practices Act, 15 U.S.C. § 1662. ECF Nos. 1, 7. Defendants answered on
6 February 21, 2012, and asserted a counterclaim. ECF No. 5, 9.

7 II. FACTS

8 Plaintiffs (Lacelles) bought and developed real property in this
9 state. In March 2002 they formed and were members of LC Custom Homes,
10 LLC (Custom Homes). Early in 2005 Custom Homes applied for a loan from
11 Westsound Bank. The bank required Mr. Lacelle to sign a commercial
12 security agreement (CSA) and a guaranty as additional security for the
13 debts of Custom Homes. The CSA was secured by a beneficial interest in
14 Mr. Lacelle's \$200,000.00 personal life insurance policy. ECF No. 7 at
15 ¶¶ 2.1-2.6; ECF No. 27 at ¶¶ 1-6, Ex. 1 and 2.

16 On March 24, 2005, Mr. Lacelle, as the managing member of Custom
17 Homes, executed two notes on behalf of Custom Homes. One was for \$212,
18 950.00 (Ex. 3, note 1) and the other, \$637,500.00 (Ex. 4, note 2). The
19 notes were secured by Deeds of Trust against real property: Lots 29
20 (undeveloped) and 36 (land under development). The notes required
21 monthly interest payments beginning May 10, 2005, and the tenth of the
22 month thereafter. The notes had an original due date of 3/25/2006. ECF
23 No. 27 at ¶¶ 7-9.

24 On July 12, 2005, Custom Homes made the interest-only payments two
25 days late. Plaintiffs allege under the terms of the notes, Custom Homes
26 was in default. By their terms the notes could be enforced upon failure
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1 to make timely payment, however, default was not pursued at that time.
2 The Lacelles never personally made payment on behalf of Custom Homes.
3 ECF No. 27 at ¶¶ 10-11, Ex. 14 and 15.

4 Custom Homes was having difficulty meeting its obligations to
5 Westsound Bank. Although both notes were originally due 3/25/2006, the
6 bank agreed to a number of extensions as Custom Homes attempted to sell
7 Lots 29 and 36. At the same time the notes were being extended, the
8 parties modified the additional security, i.e., the life insurance
9 policy. On December 2, 2005, Mr. Lacelle, as managing member of Custom
10 Homes, executed an agreement to assign a certificate of deposit (CD) to
11 the bank as security for its loans to Custom Homes (Ex. 13). ECF No. 27
12 at ¶¶ 13-14.

13 Plaintiffs allege the CD agreement fails to include the terms or
14 conditions of the loan to Custom Homes or the obligations of payment of
15 Mr. and Mrs. Lacelle. Under "additional terms" the agreement states
16 Custom Homes can apply the withdrawal toward the payment of the secured
17 debts, notes 1 and 2. ECF No. 27 at ¶ 14.

18 On August 9, 2006, Mr. Lacelle, as managing member of Custom Homes,
19 signed a Commercial Debt Modification Agreement (Ex. 13), whereby a
20 personal CD in the amount of \$200,000.00 was released and replaced with
21 a Deed of Trust against the Ronald Property, a home in Ronald,
22 Washington. On August 22, 2006, Mr. and Mrs. Lacelle signed a real
23 estate Deed of Trust against this Ronald, Washington home. ECF No. 24 at
24 page 133. They allege they did not sign any separate promise or
25 agreement for the \$200,000.00 obligation set forth in the Ronald Deed of
26 Trust. Plaintiffs allege this DOT stated the \$200,000.00 represented
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1 security for notes 1 and 2, and if the notes were satisfied, this
2 security was released. ECF No. 7 at ¶2.8; ECF No. 27 at ¶¶ 15-16.

3 The Ronald DOT further states the secured debt is evidenced by the
4 promissory notes, contract guaranties "we may have signed," and states
5 "This is a master Deed of Trust and will Cross Collateralize With any
6 and all Loans Made to Entities Established by Perry Lacelle..." ECF No.
7 27 at ¶ 17.

8 With respect to the two notes, on 3/26/2006 note 1 was declared to
9 be in default and due. On 9/25/2006, the same was declared as to note 2.
10 ECF No. 27 at ¶ 18, Ex. 3 and 4.

11 Plaintiffs allege these are the entire obligations previously
12 belonging to Westsound Bank which could have been asserted against
13 Custom Homes or the additional security, the Ronald DOT. When those
14 obligations were declared satisfied, plaintiffs continue, any additional
15 security interest, such as the Ronald DOT, was also satisfied. *Id.*

16 On or about March 10, 2011, the debt to Westsound Bank (after
17 takeover by the FDIC) was assigned by the FDIC to defendant SFR Venture.
18 The loan was in default when it was transferred. ECF No. 7 at ¶¶ 2.15-
19 2.16, ECF No. 27 at ¶ 19.

20 SFR Venture began a non-judicial foreclosure of Lots 29 and 36.
21 Mr. and Mrs. Lacelle allege they never received personal notice of the
22 foreclosures. They believed the non-judicial foreclosures "directed to
23 Custom Homes would satisfy any claimed personal obligation." ECF No. 7
24 ¶¶ at 2.17-2.18; ECF No. 27 at ¶ 20. Plaintiffs wrote to defendant
25 Ghidotti on June 20, 2011 requesting documentation to support the
26 claimed obligation and the proper start of the non-judicial foreclosure.
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1 ECF No. 7 at ¶ 2.19 (Ex. C). Defendants assert notices were sent. ECF
2 No. 34 at ¶¶ 7, 9.

3 Both lots were sold on August 5, 2011. ECF No. 27 at ¶ 21, 34 at ¶
4 12. Plaintiffs allege the notices of sale (Lot 29, Ex. 8 and Lot 36, Ex.
5 10) were not directed to the Lacelles personally and failed to provide
6 notice that they would be personally liable for any claimed deficiency.
7 Plaintiffs allege defendant SFR Venture declared the obligation
8 satisfied in full and no other obligation supports a promise to pay the
9 obligation referred to in the Ronald DOT. ECF No. 27 at ¶¶ 21-24.

10 Plaintiffs assert that, unbeknownst to the Lacelles, Trustee
11 Michelle Ghidotti, who conducted the nonjudicial foreclosure and sale of
12 Lots 29 and 36, began a nonjudicial foreclosure of the Lacelle's Ronald
13 property. ECF No. 27 at ¶ 25; Ex. 6. These notices recite the claimed
14 obligations in default are the obligations of notes 1 and 2. Plaintiffs
15 allege that following nonjudicial foreclosure on Lots 29 and 36, the
16 language in the Trustee's Deeds filed by defendant Ghidotti clearly
17 states the claimed debts are paid in full and satisfied. [Defendants
18 discontinued the nonjudicial foreclosure of the Ronald property prior to
19 the trustee's sale. ECF No 23 at ¶ 24.] Plaintiffs allege their real
20 property should be restored to them free of any claimed deficiency
21 resulting from the nonjudicial foreclosure sales of the security for
22 notes 1 and 2. Plaintiffs seek declaratory judgment granting this
23 relief. ECF No. 1 at ¶¶ 3.1-3.9, ECF No. 27 at ¶¶ 25-28.

24 As set forth below in greater detail, plaintiffs sued defendants
25 alleging they violated the Washington Collection Agency Act, the Fair
26 Debt Collection Practices Act and the Washington Consumer Protection
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1 Act, causing plaintiffs damage. They seek to quiet title with respect to
2 the Ronald (but not the Wexford¹) property, as well as injunctive relief
3 enjoining foreclosures of the Ronald property. Plaintiffs allege
4 defendants failed to mitigate damages. ECF No. 7 at ¶¶ 7.2-7.3, 8.2-8.3;
5 9.2-9.3, and pages 11-13.

6 Defendants counterclaimed for declaratory judgment seeking a first
7 lien in the amount of \$200,000.00 pursuant to what they call the
8 Kittitas (also described elsewhere as Ridgecrest and Ronald) Deed of
9 Trust. No deficiency is being sought.

10 Defendants moved for summary judgment seeking dismissal of all
11 claims, summary judgment as to its counterclaim and a decree of
12 foreclosure. ECF No. 20 at 1.

13 **III. CLAIMS**

14 Plaintiffs allege three statutory claims and four claims related to
15 allegedly void documents. As to the latter, plaintiffs allege they are
16 entitled, pursuant to RCW 7.24.010 and .020, to a declaratory judgment
17 that, as a matter of law, "any personal obligation/guarantee" for the
18 Ronald Deed of Trust is (1) barred by the statute of limitations, (2)
19 null, void or voidable because they lack new or sufficient
20 consideration, (3) the Guaranty is null, void or voidable because it
21 lacks essential contract elements, (4) the Ronald Deed of Trust is null,
22 void or voidable because they lack the essential elements to support the
23 obligation and (5) the prior non-judicial foreclosures of real property
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26 ¹The Wexford Avenue, Port Orchard property in Kitsap County is
27 not before the court. ECF No. 9 at pages 8-11, ECF No. 23 at ¶¶16-18;
28 Ex. H.

1 securing the debt of Custom Homes have released or satisfied any claims
2 for any alleged obligations of plaintiffs. ECF No. 7 at ¶¶ 3.2-3.7.

3 With respect to the statutory claims, as set forth more fully
4 below, plaintiffs allege violations of the Fair Debt Collection
5 Practices Act, the Washington Collection Agency Act and the Washington
6 Consumer Protection Act. ECF No. 7 at ¶¶ 3.8-3.11, 4.2-4.3, 4.5.

7 IV. SUMMARY JUDGMENT

8 Summary judgment is appropriate if there is no genuine issue of
9 material fact and the moving party is entitled to judgment as a matter
10 of law. Fed.R.Civ.P. 56(a). The moving party bears the responsibility
11 of informing the court of its basis of its motion, and identifying those
12 portions of "pleadings, depositions, answers to interrogatories, and
13 admissions on file, together with the affidavits, if any," which it
14 believes demonstrate the absence of a genuine issue of material fact."
15 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)(quoting Fed. R. Civ.
16 P. 56©).

17 If the moving party meets its initial burden of showing 'the
18 absence of a material and triable issue of fact, 'the burden then moves
19 to the opposing party, who must present significant probative evidence
20 tending to support its claim or defense.'" *Intel Corp. v. Hartford*
21 *Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991)(quoting
22 *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987)).
23 The non moving party must go beyond the pleadings and designate facts
24 showing an issue for trial. *Celotex*, 477 U.S. at 322-23.

25 The substantive law governing a claim determines whether a fact is
26 material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809

1 F.2d 626, 630 (9th Cir. 1987). All reasonable doubts as to the existence
2 of a genuine issue of fact must be resolved against the moving party.
3 *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574,
4 587 (1986). The court should view inferences drawn from the facts in the
5 light most favorable to the nonmoving party. *T.W. Elec. Serv.*, 809 F.2d
6 at 630-31.

7 If the factual context makes the nonmoving party's claim as to the
8 existence of a material issue of fact implausible, that party must come
9 forward with more persuasive evidence to support his claim than would
10 otherwise be necessary. *Id.*; *In re Agricultural Bldg. Prod., Inc. v.*
11 *Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468 (9th Cir. 1987).

12 The court's inquiry at summary judgment is therefore whether a
13 reasonable jury could find by the preponderance of the evidence that the
14 nonmoving party is entitled to a verdict. *Anderson v. Liberty Lobby,*
15 *Inc.*, 477 U.S. 242, 252 (1986).

16 V. DISCUSSION

17 A. Claim one: violation of the Fair Debt Collection Practices Act

18 Plaintiffs allege defendants are debt collectors as defined by the
19 FDCPA, 15 U.S.C. § 1692 and are not licenced or authorized to attempt to
20 collect debt. Plaintiffs allege defendants violated the statute by
21 attempting to collect alleged debt against plaintiffs, attempting to
22 enforce a time-barred debt, and attempting to collect a debt using a
23 false or misleading name. Further, despite actual notice the alleged
24 debt is disputed, plaintiffs allege defendants have failed to provide
25 information required by statute, including the debt amount, creditor's
26 name, "to whom the debt is owned [sic]," validation of the debt, and
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1 their authority to collect. As a result, plaintiffs allege they are
2 entitled to actual damages, additional damages not exceeding \$1,000.00
3 per occurrence and attorneys' fees. ECF No. 7 at ¶¶ 5.2-5, citing 15
4 U.S.C. ¶ 1692k and section 13.

5 Defendants answer they are not debt collectors, and, more
6 importantly, the statute relied on is expressly limited to consumer,
7 rather than commercial, loans. As the loans at issue in this case are
8 admittedly commercial, the statute does not apply. ECF No. 33 at 4.

9 Defendants are correct. They accurately point out that the nature
10 of the debt is determined when it originates. It is undisputed these
11 loans were obtained for the commercial purpose of building and selling
12 homes. Further, a nonjudicial foreclosure of commercial (rather than
13 consumer) property does not satisfy the debt but simply creates a bar
14 against deficiency judgments in certain instances. ECF No. 33 at 4-7;
15 RCW 61.24.100(1).

16 Plaintiffs as the nonmoving party fail to produce at least some
17 significant probative evidence tending to support this claim. There is
18 no evidence the debt as it originated was for consumer rather than
19 commercial purposes. Accordingly, defendants are entitled to summary
20 judgment as a matter of law as to plaintiffs' FDCPA claim. Defendant's
21 motion for summary judgment as to this claim, ECF No. 20, is **GRANTED**.
22 This claim is dismissed with prejudice.

23 **B. Claim two: violation of the Washington Collection Agency Act**

24 Similarly, plaintiffs allege defendants violated the Washington
25 Collection Agency Act (WCAA) by (1) failing to provide proof of
26 authority to collect the alleged debt against plaintiffs; (2) attempting
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1 to enforce a debt that is void, voidable or unenforceable; (3)
2 attempting to enforce a debt that is barred by the state statute of
3 limitations; and (4) asserting a claim or attempting to collect a debt
4 using a false or misleading name. ECF No. 7 at ¶ 4.4.

5 Defendants answer that, again, they are not a collection agency and
6 so could not have violated the act. As defined by the WCAA, defendants
7 point out they could not be debt collectors unless they are trying to
8 collect a debt "owed or due another person." Defendants assert they are
9 not trying to collect a debt owed to another person. ECF No. 33 at 9-11;
10 RCW 19.16.100(2)(a).

11 Defendants are correct. Defendant SFR Venture is not trying to
12 collect a debt owed to another person. By definition, it is not subject
13 to the act.

14 Similarly, Ms. Ghidotti is not a collection agency as contemplated
15 by the act. ECF No. 33 at 10-11. Rather, as defendants accurately
16 assert, she is an attorney whose primary activity is practicing law and
17 she does not engage in debt collection, other than acting as trustee for
18 nonjudicial foreclosures. She is therefore not a collection agency. *Id.*,
19 *citing Motherway v. Gordon*, 2010 WL 2803052 at *5 (W.D. Wash. 2010)(a
20 law firm which only engages in the legal aspects of debt collection is
21 not a "collection agency" for the purposes of WCAA regulation).
22 Defendants are correct. Because plaintiffs' claim alleging violations of
23 the WCAA fails as a matter of law, defendants' motion for summary
24 dismissal of this claim, ECF No. 20, is **GRANTED**.

25 **C. Claim three: violation of Washington Consumer Protection Act**

26 Third, plaintiffs allege defendants violated RCW 19.86, based on
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1 violations of RCW 19.16.440, entitling them to judgment for treble
2 damages, costs and attorneys' fees. ECF No. 7 at ¶¶ 6.2-6.4

3 However, because plaintiffs cannot establish the underlying
4 violation on which this claim is based, the WCAA, the CPA claim must
5 also fail. Plaintiffs' claim alleging violations of the Washington CPA
6 fails as a matter of law. Defendant's motion for summary judgment with
7 respect to the CPA claim is **GRANTED**.

8 **D. Request for action to quiet title**

9 Plaintiffs ask that any claimed lien, mortgage or cloud of title to
10 the Ronald property should be quieted in plaintiffs' name. ECF No. 7 at
11 ¶¶ 7.2-7.3. They assert the statute of limitations has run and the
12 defendant trustee's deed recitals prevent further collection on the
13 debt. ECF No. 30 at 5-7, 11-20; 37 at 5-9.

14 Defendants answer that these properties are owned by plaintiffs Mr.
15 and Mrs. Lacelle, not by LC Custom Homes; plaintiffs admitted they
16 signed the Ridgecrest (Ronald) DOT; admitted they defaulted on the
17 loans; cannot contest receiving consideration in the form of a "pure
18 collateral substitution of equal value," as the bank released its
19 security interest in a \$200,00.00 CD in exchange for granting the
20 Ridgecrest (Ronald) DOT, which has a principal cap of \$200,000.00, and,
21 last, Mr. Lacelle admitted he signed a personal unconditional guaranty
22 of the loans. ECF No. 22 at 12-13.

23 The DOTs were granted to secure the debt of Custom Homes. Because
24 Custom Homes received consideration (loan advances and releases of
25 collateral) the DOTs are valid and, as defendants point out, fully
26 enforceable. ECF No. 22 at 12-14. Defendants' motion for summary
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judgment, ECF No. 20, as to plaintiffs' claim seeking to quiet title is
**GRANTED as to the Ronald property and this claim is dismissed with
prejudice.**

E. Injunctive relief

Plaintiffs ask defendants be enjoined from beginning or conducting
trustees' sales or foreclosures of plaintiffs' Ronald property. ECF No.
7 at ¶¶ 8.2-8.3.

Defendants answer that because the right to judicially foreclose
other DOTs is expressly reserved by RCW 61.24.100(3)(b), they are
entitled to foreclose. The borrower here was provided consideration
supporting the DOTs. And, the statute of limitations does not run until
2014 (six years after the default in November 2008). ECF No. 33 at 11-
12. Defendants are correct. There is no issue of fact and defendants are
entitled to foreclose on the Ridgcrest (Ronald) DOT as a matter of law.

Plaintiffs allege a mistake in the trustee's deeds following the
nonjudicial foreclosure sales of Lots 29 and 36 supports their claim
that the loans have been satisfied. ECF No. 27 at page 7. Defendants
reply is simple: mistaken deed language that the sales were made in
satisfaction in full of the obligation secured by the deed of trust was
a representation from the trustee *to the sale's high bidder*, not to the
defaulted borrower (plaintiffs). As such it has no legal relevance to
the secured party's remaining collateral rights under RCW
61.24.100(3)(b). ECF No. 33 at pages 14-16 (emphasis added). Defendants
are correct.

Defendant Ghidotti admits she included the language by mistake. ECF
No. 36 at 2-3 [deeds at ECF No. 27 at Ex. 9, 11, ¶10]. Defendant SFR

Venture did not make a full credit bid on either Lot 29 or Lot 36. *Id.* Plaintiffs are not parties to the trustee's deeds. Moreover, plaintiffs did not even learn of the mistake until discovery in this litigation, meaning they could not have relied on the mistake to their detriment. Defendants' motion for summary judgment with respect to plaintiffs' claim that foreclosures should be enjoined, ECF No. 20, is **GRANTED as to the Ronald property.**

F. Failure to mitigate

Plaintiffs allege defendants refused an offer of \$450,000.00 for the sale of Lot 29 and instead sold it for \$350,000.00 at the trustee's sale. Plaintiffs ask that if judgment is entered for defendants it should be offset by a sum equal to the amount defendants would have recovered if they had properly attempted to mitigate their damages. ECF No. 7 at ¶¶ 9.2-9.4. As defendants noted at oral argument, the amount before the court today is the limit of the DOT, \$200,000. The argument is therefore irrelevant.

For the reasons discussed previously, there is no merit to this claim by the defaulting debtor, and defendants' motion for summary judgment as to this claim, ECF No. 20, is **GRANTED.**

G. Defendants' counterclaim

In addition to asking the court to dismiss all of plaintiffs' claims as a matter of law, defendants ask the court to grant summary judgment as to its counterclaim. ECF No. 20 at 1. Defendant SFR Venture seeks judicial foreclosure on the Ridgecrest (Ronald) DOT as a matter of law. ECF No. 22 at 15. For the reasons outlined above, defendant SFR Venture is entitled to the relief requested. With respect to defendants'

1 motion for summary judgment as to its counterclaim, ECF No. 20, the
2 motion is **GRANTED**.

3 **H. Plaintiff's cross-motion for partial summary judgment**

4 Plaintiffs ask the court to decide as a matter of law that (1)
5 defendants are debt collectors as defined by 15 U.S.C. § 1692, (2) and
6 are subject to the Washington Collection Agency Act, (3) claims against
7 plaintiffs are barred by the statute of limitations and (4) defendants
8 have "waived, released or are otherwise barred from pursuing a claim
9 against plaintiffs." ECF No. 26 at 1-2. As noted, defendants are correct
10 that the statute of limitations has not run.

11 For the reasons outlined above, plaintiffs' motion for partial
12 summary judgment, **ECF No. 26, is DENIED**.

13 **VI. CONCLUSION**

14 After considering the motion and the record,

15 **IT IS ORDERED** that defendants' motion for summary, **ECF No. 20**, and
16 its counterclaim, are **GRANTED** as to all claims. Plaintiff's motion for
17 partial summary judgment, **ECF No. 26**, is **DENIED**.

18 The District Court Executive is directed to file this Order and
19 provide copies to counsel for plaintiffs and defendants.

20 **DATED** this 9th day of November, 2012.

21
22 s/James P. Hutton

23 JAMES P. HUTTON

24 United States Magistrate Judge
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